

4VAC15-20-130

Definitions and Miscellaneous: In General; Endangered and threatened species; adoption of federal list; additional species enumerated.

Summary:

The proposal is to (i) update the date reference to the federal list of endangered and threatened wildlife species; (ii) update the Virginia List of Endangered and Threatened Species to remove the state threatened barking treefrog, add the red-cockaded woodpecker and Clinch dace as endangered, and retain the black rail as endangered to reflect their status in Virginia more accurately; and (iii) update requirements regarding allowable incidental take of little brown and tricolored bats to reflect their status in Virginia and to reduce regulatory burden.

Proposed language of amendment:

4VAC15-20-130. Endangered and threatened species; adoption of federal list; additional species enumerated.

A. The board hereby adopts the Federal Endangered and Threatened Species List, Endangered Species Act of December 28, 1973 (16 USC §§ 1531-1543), as amended as of ~~May 7, 2019~~ January 13, 2021, and declares all species listed thereon to be endangered or threatened species in the Commonwealth. Pursuant to subdivision 12 of § 29.1-103 of the Code of Virginia, the director of the department is hereby delegated authority to propose adoption of modifications and amendments to the Federal Endangered and Threatened Species List in accordance with the procedures of §§ 29.1-501 and 29.1-502 of the Code of Virginia.

B. In addition to the provisions of subsection A of this section, the following species are declared endangered or threatened in this Commonwealth, and are afforded the protection provided by Article 6 (§ 29.1-563 et seq.) of Chapter 5 of Title 29.1 of the Code of Virginia:

1. Fish:

Endangered

<u>Dace, Clinch</u>	<u>Chrosomus sp. cf. saylori</u>
Dace, Tennessee	Phoxinus tennesseensis
Darter, sharphead	Etheostoma acuticeps
Darter, variegate	Etheostoma variatum
Sunfish, blackbanded	Enneacanthus chaetodon

Threatened:

Darter, Carolina	Etheostoma collis
Darter, golden	Etheostoma denoncourti
Darter, greenfin	Etheostoma chlorbranchium
Darter, sickle	Percina williamsi
Darter, western sand	Ammocrypta clara

Madtom, orangefin	Noturus gilberti
Paddlefish	Polyodon spathula
Shiner, emerald	Notropis atherinoides
Shiner, steelcolor	Cyprinella whipplei
Shiner, whitemouth	Notropis alborus

2. Amphibians:

Endangered:

Salamander, eastern tiger	Ambystoma tigrinum
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Threatened:

Salamander, Mabee's	Ambystoma mabeei
Treefrog, barking	Hyla gratiosa

3. Reptiles:

Endangered:

Rattlesnake, canebrake (Coastal Plain population of timber rattlesnake)	Crotalus horridus
Turtle, bog	Glyptemys muhlenbergii
Turtle, eastern chicken	Deirochelys reticularia reticularia

Threatened:

Lizard, eastern glass	Ophisaurus ventralis
Turtle, wood	Glyptemys insculpta

4. Birds:

Endangered:

Plover, Wilson's	Charadrius wilsonia
Rail, black	Laterallus jamaicensis
Woodpecker, red-cockaded	Dryobates borealis
Wren, Bewick's	Thryomanes bewickii bewickii

Threatened:

Falcon, peregrine	Falco peregrinus
Shrike, loggerhead	Lanius ludovicianus
Sparrow, Bachman's	Aimophila aestivalis
Sparrow, Henslow's	Ammodramus henslowii
Tern, gull-billed	Sterna nilotica

5. Mammals:

Endangered:

Bat, Rafinesque's eastern big-eared	<i>Corynorhinus rafinesquii macrotis</i>
Bat, little brown	<i>Myotis lucifugus</i>
Bat, tri-colored	<i>Perimyotis subflavus</i>
Hare, snowshoe	<i>Lepus americanus</i>
Shrew, American water	<i>Sorex palustris</i>
Vole, rock	<i>Microtus chrotorrhinus</i>

6. Mollusks:

Endangered:

Coil, rubble	<i>Helicodiscus lirellus</i>
Coil, shaggy	<i>Helicodiscus diadema</i>
Deertoe	<i>Truncilla truncata</i>
Elephantear	<i>Elliptio crassidens</i>
Elimia, spider	<i>Elimia arachnoidea</i>
Floater, brook	<i>Alasmidonta varicosa</i>
Ghostsail, thankless	<i>Holsingeria unthinksensis</i>
Heelsplitter, Tennessee	<i>Lasmigona holstonia</i>
Lilliput, purple	<i>Toxolasma lividus</i>
Mussel, slippershell	<i>Alasmidonta viridis</i>
Pigtoe, Ohio	<i>Pleurobema cordatum</i>
Pigtoe, pyramid	<i>Pleurobema rubrum</i>
Springsnail, Appalachian	<i>Fontigens bottimeri</i>
Springsnail (no common name)	<i>Fontigens morrisoni</i>
Supercoil, spirit	<i>Paravitrea hera</i>

Threatened:

Floater, green	<i>Lasmigona subviridis</i>
Papershell, fragile	<i>Leptodea fragilis</i>
Pigtoe, Atlantic	<i>Fusconaia masoni</i>
Pimpleback	<i>Quadrula pustulosa pustulosa</i>
Pistolgrip	<i>Tritogonia verrucosa</i>
Riversnail, spiny	<i>Iofluvia</i>
Sandshell, black	<i>Ligumia recta</i>
Supercoil, brown	<i>Paravitrea septadens</i>

7. Arthropods:

Threatened:

Amphipod, Madison Cave	Stygobromus stegerorum
Pseudotremia, Ellett Valley	Pseudotremia cavernarum
Xystodesmid, Laurel Creek	Sigmoria whiteheadi

C. It shall be unlawful to take, transport, process, sell, or offer for sale within the Commonwealth any threatened or endangered species of fish or wildlife except as authorized by law.

D. The incidental take of certain species may occur in certain circumstances and with the implementation of certain conservation practices as described in this subsection:

Species	Location	Allowable Circumstances	Required Conservation Measures	Expected Incidental Take
Little brown bat Tri-colored bat	Statewide	Human health risk – need for removal of individual animals from human-habited structures.	Between May 15 and August 31, no exclusion of bats from maternity colonies, except for human health concerns. DGIF department-permitted nuisance wildlife control operator with DGIF department-recognized certification in techniques associated with removal of bats. Use of exclusion devices that allow individual animals to escape. Manual collection of individual animals incapable of sustaining themselves; transport to a willing and appropriately permitted wildlife rehabilitator.	Little to no direct lethal taking expected.
		Public safety or property damage risk – need for tree removal, application of prescribed fire, or other land management actions affecting	Hibernacula: no tree removal, use of prescribed fire, or other land management action within a 250-foot radius buffer area from December 1 through April 30. Between September 1 and November 30, increase the buffer to a 1/4-mile radius with the following conditions: for	Little to no direct lethal taking expected.

		<p>known roosts; removal of animals from known roosts.</p>	<p>timber harvests greater than 20 acres, retain snags and wolf trees (if not presenting public safety or property risk) and small tree groups up to 15 trees of 3-inch diameter at breast height (dbh) or greater, one tree group per 20 acres. Otherwise, document the need (public safety, property damage risk) for tree removal during this period and verify that no known roost trees exist in the buffer area. Tree removal and prescribed fire are permitted outside of these dates.</p> <p>Known roost trees: no tree removal, use of prescribed fire, or other land management action within a 150-foot radius buffer area from June 1 through July 31, if possible. Otherwise, document public safety or property damage risk.</p> <p><u>DGIF</u>department-permitted nuisance wildlife control operator with <u>DGIF</u>department-recognized certification in techniques associated with removal of bats.</p> <p>Use of exclusion devices that allow individual animals to escape.</p> <p>Manual collection of individual animals incapable of sustaining themselves; transport to a willing and appropriately permitted wildlife rehabilitator.</p>	
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		<p>Facility or project operations when conducted in accordance with a DGIF-approved plan associated with these species.</p>	<p>Development and implementation of a plan that avoids, minimizes, and mitigates incidental take associated with an otherwise lawful activity.</p> <p>The plan shall include, but not be limited to, documenting the specific condition or action, the specific mitigation to be taken, and the expected incidental take.</p>	<p>Little to no direct lethal taking expected.</p>
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Rationale:

Adoption of the updated and modified federal list of endangered and threatened wildlife species:

Maintaining the currency of the Board's adoption of the federal list is essential to clarifying the state and federal status of each affected species and to ensuring compliance with our Cooperative Agreements with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service regarding interagency management of these species.

Changes to the State List of Endangered and Threatened Species

- A. *Removal of the barking treefrog as a threatened species:*** The Barking Treefrog (*Hyla gratiosa*) is the largest treefrog species in North America ranging from southern New Jersey and Delaware, southward along the southeastern Coastal Plain through most of the Florida Peninsula, and westward to southeastern Louisiana. It was listed as State Threatened under Virginia's Endangered Species Act on 1 January 1991. According to the 1993 draft Barking Treefrog Recovery Plan, the primary threats that warranted listing were loss of habitat and collection for the pet trade.

Barking Treefrogs have been found breeding in a variety of semi-permanent and permanent wetlands, including cypress-gum swamps, sinkholes, flooded farm fields, road-side ditches, and interdunal swales, many of which are relatively abundant throughout southeastern Virginia. In 1991, there had only been 11 observations of Barking Treefrogs made in Chesterfield, Isle of Wight, Mathews and Surry counties, with unverified sites in Greenville, Southampton and Sussex counties. Since 1999, there have been 71 new observations documented, including ones from several new counties and cities (Brunswick, Gloucester, Greenville, Lunenburg, Nottoway, Prince George, Southampton, Sussex, and Virginia Beach). Only a handful of these observations are from previously documented sites.

The threat of collection for the pet trade is a serious problem for many species of reptile and amphibian. In the past 15 years, however, there have only been two observed incidents of Barking Treefrogs being sold in the Commonwealth. In one instance, the animals were being sold at a PetSmart in James City County, but were removed from display and sale once the issue was brought to the attention of the store manager. In the second instance, the animals were being sold online by a private vender.

Based on the amount of suitable habitat, the lack of evidence that collection for the pet trade is a threat, and the number of new observations recorded since its listing, the proposal is that the Barking Treefrog be removed from the state list of endangered and threatened species. Further, the Board-proposed changes to 4VAC15-360-10 would continue to protect this species from unpermitted possession, collection, sale, etc., since it is a Species of Greatest Conservation Need listed in Virginia's 2015 Wildlife Action Plan.

- B. *Addition of the Clinch dace as an endangered species:*** In 1999, a species new to science, the Clinch Dace, *Chrosomus* sp. cf. *saylori*, was discovered in the upper Clinch drainage of Virginia. Since its discovery, the DWR has funded multiple studies to learn basic information needed to conserve the species. Although it remains undescribed, its life history, morphometric and

meristic data support its classification as a distinct species.

Like other members of its genus that are headwater specialists, the Clinch Dace is found in streams less than third order and wetted widths averaging 13 feet. Conversely, Clinch Dace may occur at lower local densities than any of the other *Chrosomus* dace due to its more specialized diet (mainly insectivorous), higher trophic position, shorter lifespan (2 years), and lower reproductive success.

Subsequent sampling have found only 15 populations in Russell and Tazewell counties, with a total occupied stream length of just under 20 miles and estimated global population of 6,700 individuals. These populations are small and fragmented; gene flow between them is restricted, maybe non-existent. Further, riparian land use and mining pose significant threats to essential habitat. As such, the Clinch Dace was designated as a Federal Species of Concern and is included in Virginia's Wildlife Action Plan as a Species of Greatest Conservation Need, Tier I - Critical Conservation Need. All studies recommend additional protections including federal and state listing. Two other members of the genus, Blackside Dace (*C. Cumberlandensis*) and Tennessee Dace (*C. tennesseensis*), are federal and state listed respectively. The extremely rare occurrence of the Clinch Dace, and immediate threats to its habitat, warrant its inclusion on the state list of endangered and threatened species as an endangered species and it being afforded all protections of the Virginia Endangered Species Act.

- C. Addition of Red-cockaded Woodpecker as Endangered:** In 2020, the U.S. Fish and Wildlife Service proposed to downlist the red-cockaded woodpecker (*Dryobates borealis*) from endangered to threatened under the federal Endangered Species Act. The U.S. Fish and Wildlife Service noted that, through partnerships with the U.S. Department of Defense and the U.S. Forest Service, more than 1.3 million acres of longleaf pine stands (the species' preferred habitat) have been established and hundreds of cavity inserts have been placed in trees to expand and support nesting. Additionally, the number of pairs of red-cockaded woodpeckers has increased by 50% since the time of initial listing.

Virginia is the northernmost extent of the range of this species. In the Commonwealth, the species is only known from two locations – the Piney Grove/Big Woods complex in Sussex County and the Great Dismal Swamp National Wildlife Refuge in the cities of Suffolk and Chesapeake. By 1998, the year in which The Nature Conservancy acquired its Piney Grove Preserve, the Virginia population of red-cockaded woodpecker was nearly extirpated, consisting of only 3 potential breeding groups on the Preserve. Aggressive habitat and cavity management on the Preserve, completed by a translocation program active through 2005, has enabled that population to grow to 15 potential breeding groups numbering just over 100 birds. In the past five years, birds from this population have begun pioneering off of the Preserve and onto the DWR's abutting Big Woods Wildlife Management Area, where habitat and cavity management strategies complement those at Piney Grove. A single pair of woodpeckers has nested on the WMA in each of the past two years, and the DWR expects more birds to establish breeding groups on Big Woods. The population at the Great Dismal Swamp National Wildlife Refuge is in the process of being established via translocations of birds from other populations since 2015, coupled with selective habitat management. Currently, the Refuge population numbers only 11 birds in 3 potential breeding groups. Both locations are highly vulnerable to significant weather events, such as hurricanes and ice storms, as well as wildfires and outbreaks of pine bark beetles. Such events could cause critical losses and erase years of gains by doing untold damage to cavity

trees, upon which the birds rely for roosting and nesting. These events could also damage the species' foraging base, which consists of younger, smaller pine trees; these trees are vital in replacing current cavity trees as the latter die out over time. The need to continue aggressive efforts to enhance the species in Virginia, including protection under the Virginia Endangered Species Act, are imperative to its persistence in the state and reflective of its imperiled status in the Commonwealth.

- D. *Retain the state endangered status for the Eastern Black Rail:*** The Eastern Black Rail was state listed as endangered in 2012 following the first systematic breeding survey conducted in areas with suitable habitat on Virginia's coastal plain. Only 16 individuals were detected at 12 sampling points along the eastern shore of the Chesapeake Bay in Accomack County. No Black Rails were detected on the seaside of the Delmarva Peninsula, the western shore of the Chesapeake Bay, along the James, York or Nansemond rivers, or in Back Bay. Only two Black Rails were documented during the Commonwealth's second coastal survey conducted in 2014; both detections were made at Saxis Wildlife Management Area. Virginia's current estimate ranges between 0 and 10 pairs. Several scattered observations of Black Rails have been recorded within the inner Coastal Plain, Piedmont and Mountain regions of the Commonwealth since the late 1930s, although none of these records included confirmation of breeding activity.

The Chesapeake Bay marshes of the Delmarva Peninsula from Dorchester County, Maryland, through Accomack County, Virginia, have long been considered the most important region in the Mid-Atlantic for Black Rails. Black Rail surveys conducted on the bayside and seaside of the Maryland's Delmarva Peninsula in 1990-1992, 2007 and again in 2014 reported a 90% decline in the number of locations where they were found during this 25 year period. Results from Virginia and Maryland suggest that recent dramatic population declines are rapid and devastating. Factors driving the near extirpation of Maryland's and Virginia's breeding population are not completely understood, but likely include habitat loss and degradation due to sea level rise, development, marsh burning and mosquito ditching as well as predation, invasive plants, low reproductive rates, low overwinter survival and environmental contaminants.

In 2020, the U.S. Fish and Wildlife Service (USFWS) listed the Eastern Black Rail as threatened, despite the >75% decline in the range-wide population during the last 10-20 years. The USFWS based its decision on the wide-ranging nature of the Eastern Black Rail and the opportunity to engage with a diversity of partners to work collaboratively on its recovery. This approach puts a considerable amount of responsibility on states to ensure the species receives the highest degree of protection and management attention at the local level. Typically, when a species on the state list achieves a federal listing status, staff recommends removal of it from the state list and adoption of the federal status. However, in this instance, retaining the species' status as endangered in Virginia affords the DWR the greatest opportunity to meet its obligation of protection and affirms the critical degree of imperilment of this species in the state.

- E. *Update incidental take allowances for little brown and tricolored bats.*** In 2015, the Board of Wildlife Resources added the little brown and tri-colored bats to the list of state endangered and threatened species as endangered species. Concurrent with that action, the Board also adopted certain provisions under which the incidental take of these two species would be allowed. One of

these provisions included “facility or project operations when conducted in accordance with DGIF-approved plan associated with these species.” Since 2015, the DWR has been monitoring population changes of these two species through winter hibernacula counts and documenting summer occurrence and roost identification through multiple DWR-funded mist-netting and acoustic surveys. Due to the continued decline of both species as documented through winter hibernacula counts, and the lack of discovering new roosts through mist-net surveys, staff believes that incidental take resulting from facility or project operations is inconsequential (because there are so few animals of either species on the landscape) and that the development of an “approved plan” for facility or project operations provides little to no conservation gain. As such, the Board proposal removes this specific requirement, which will also reduce regulatory burden, as there is little to no expected incidental take regardless.

Additional housekeeping changes are offered to update the use of “DGIF” to the more appropriate reference of “department.”